No. 337

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1948

THEODORE DARR, JOHN DUDASIK, THOMAS FARACHER, NEIL GANNON, JAMES GRAHAM, KAY A. JACOBSEN, HARRY JACOBSON, ADOLPH LUTTECKE, JOSEPH B. MARTIN, ROBERT MARTIN, JOHN MOHLMAN, CARL NEWBERG, JOHN STROKOL, ARTHUR TAYLOR and JERRY J. ULIANO, suing in behalf of themselves and all other employees and former employees of defendant similarly situated,

Plaintiffs-Petitioners,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Circuit Court of Appeals in this case is reported in 169 F. 2d 262.[1]

[1] The opinion in the companion case, *Battaglia* v. *General Motors Corp.*, which sets forth the grounds on which the Court upheld the constitutionality of the Portal to Portal Act was reported in 169 F. 2d 254. It has been reprinted and filed with the record in this case for the convenience of this court.

The opinion of the District Court, dated April 30, 1947 (R. 112-120), before the Portal to Portal Act was passed, is reported in 74 F. Supp. 80. Its opinion dated July 11, 1947 (R. 121-126) upon the constitutionality of the Portal to Portal Act is reported in 72 F. Supp. 752. Its opinion dated October 10, 1947 (R. 126-128) in which it held the complaint should be dismissed on the merits is reported in 78 F. Supp. 28.

Grounds of Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 240 of the Judicial Code. Respondent concedes the jurisdiction of this Court.

Statement of Case

Petitioners ask this Court to grant a writ of certiorari to review the unanimous decision of the Circuit Court of Appeals for the Second Circuit upholding the constitutionality of Sections 9 and 11 of the Portal to Portal Act of 1947 in an action brought by petitioners for overtime premiums and liquidated damages under the Fair Labor Standards Act of 1938.[2]

Section 9 of the Portal to Portal Act provides that no employer shall be subject to any liability, in an action commenced prior to or on or after the enactment of the Act, for or on account of failure to pay overtime compensation under the Fair Labor Standards Act if he pleads and proves "that the act or omission complained of was in good faith in conformity with and reliance on * * * any administra-

[2] The full text of Section 1 (setting forth the Congressional findings and declaration of policy), Section 9 and Section 11 of the Portal to Portal Act and of Section 2 (setting forth the Congressional findings and declaration of policy) of the Fair Labor Standards Act is given in Appendix A, pages 17-19.

tive practice or enforcement policy" of any agency of the United States "with respect to the class of employers to which he belonged." Section 11 permits a court, in its discretion, to award no liquidated damages or less than the full statutory amount if the employer shows to the satisfaction of the court that the act or omission for which the damages are claimed "was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" Act.

The claims, which the Circuit Court of Appeals held had been properly dismissed on the basis of defenses established under these Sections, were asserted by 15 building service employees in respondent's Home Office building in New York City and related to the period from April 12, 1940 to December 5, 1940. The District Court found (1) that during this period overtime premiums were not paid (R. 116-7, fols. 346-9); (2) that the terms of employment did not provide for the overtime premiums now claimed (R. 117, fol. 349); (3) that when the contracts of employment were made and when they were performed, neither petitioners nor respondent believed that the employment was covered by the Fair Labor Standards Act (*Ibid.*); and (4) that after December 5, 1940, respondent paid petitioners the full amounts "of all overtime premiums required by the Act" (*Ibid.*).

Before the entry of judgment, the Portal to Portal Act was passed and respondent moved for leave to reopen so as to plead and prove its defenses under Sections 9 and 11. The motion was granted and a new hearing held, after which the Court made additional findings (1) that, prior to December 6, 1940 at least—"the critical date for the purposes of these supplemental findings"— it had been the administrative practice and enforcement policy of the Wage and Hour Division not to enforce the Fair Labor Standards Act in the insurance industry and that this practice and policy did not change until some time in 1942 (R. 127, fol. 379); (2)

that in failing to pay overtime premiums between April 12 and December 5, 1940, respondent acted in good faith and in conformity with and in reliance on the administrative practice and enforcement policy of the Wage and Hour Division just described (R. 127, fol. 380)[3]; and, as conclusions of law, (3) that the Portal to Portal Act in its application to this case is constitutional, and (4) that the facts found entitled respondent to judgment. The Circuit Court of Appeals affirmed.

The question for determination upon petitioners' present application to this Court is, therefore, whether this Court should review the decision of the Circuit Court of Appeals that the Portal to Portal Act is constitutional.[4]

Summary of Argument

Respondent opposes petitioners' application on the following grounds:

1. The decision of the Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

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[3] The Court stated that respondent's "good faith is further inferable from the then widely prevailing view of the law to the effect that 'insurance is not commerce' according to 'numerous and unvarying decisions' of the Supreme Court * * *" (R. 127-8, fols. 381-2).

The Court also found that the change in payment for overtime which occurred on December 6, 1940 was due to the fact that at that time respondent, without admitting its coverage under the Fair Labor Standards Act, voluntaily and without any enforcement proceeding or other official compulsion, put into effect a policy of compliance with the standards established by that Act (R. 127, fol. 380).

[4] Respondent does not concede that the Fair Labor Standards Act was applicable to petitioners' employment, but in this brief does not urge that it was inapplicable.

2. The Circuit Court of Appeals has not decided any important question of federal law which has not already been clearly, authoritatively and repeatedly decided by this Court.

3. Petitioners' contention that the Portal-to-Portal Act violates the constitutional prohibition against delegation of legislative power, a contention which petitioners make for the first time in their petition to this Court, is based on a palpable misconstruction of the Act.

ARGUMENT

1. The decision of the Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

The constitutionality of the Portal-to-Portal Act has been expressly upheld by the Circuit Courts of Appeals of three Circuits—the Second, Fourth and Sixth—in 6 cases; and it was impliedly upheld in three other Circuit Court decisions, one in the Fifth, one in the Sixth and one in the Eighth Circuit (See Appendix B). It has been expressly or impliedly upheld by the District Courts in 69 cases reported in the Federal Reporter system (See Appendix C), and, in what we believe is a conservative estimate, in more than 200 unofficially reported and unreported cases.

In every instance in these more than 275 cases, the constitutionality has been upheld without a single dissenting opinion by a Judge of any Circuit Court of Appeals or District Court so far as respondent has been able to discover.[5]

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[5] In *Sveltik* v. *Vultee Aircraft Corp.*, N. D. Texas, Sept. 15, 1947, 16 U. S. Law Week, 2161 (not officially reported), the Court denied a motion to dismiss without analysis and, as it stated, without consideration of briefs.

2. The Circuit Court of Appeals has not decided any important question of federal law which has not already been clearly, authoritatively and repeatedly decided by this Court.

Although this Court has not expressly decided on the constitutionality of the retroactive provisions of the Portal-to-Portal Act of 1947, it has repeatedly decided the questions of federal law which are determinative. Not only is there no important question of federal law involved which has not already been decided by this Court, but the decision of the Circuit Court of Appeals below, particularly as applied to the facts of this case, is supported by three principles of law which this Court has repeatedly upheld and any one of which alone is sufficient to sustain it. These principles are:

(a) Claims, such as those of petitioners, which are based on rights created by a statute to effectuate a public purpose, have no existence apart from the statute and, unless previously reduced to final judgment, fall when the statute is repealed or modified.

(b) The Portal to Portal Act was a valid exercise by Congress of its power over interstate commerce; and rights, whether acquired by private contract or under a statute, are subject to change or removal by Congress in the exercise of that power.

(c) The contracts of employment between petitioners and respondent, if illegal in not providing for the payments claimed by petitioners, were validated by the retroactive curative provisions of the Portal-to-Portal Act.

(a) Claims, such as those of petitioners, which are based on rights created by a statute to effectuate a public purpose, have no existence apart from the statute and, unless previously reduced to final judgment, fall when the statute is repealed or modified.

During the period covered by the claims, petitioners were employed under employment agreements which did

not provide for any payments beyond the amounts which were actually paid (R. 117, fol. 349). These agreements were entered into in good faith (R. 127, fols. 380-1). Neither party believed petitioners had any rights beyond those which respondent recognized and in accordance with which it paid petitioners at the time (R. 117, fol. 349). At that time the parties believed that the employment was not covered by the Fair Labor Standards Act (R. 117, fol. 349).

Accordingly, at the time the contracts were made and performed, there was no meeting of minds on any agreement which would have given petitioners greater rights, nor imposed on respondent greater liability, than were then fully recognized and completely discharged.

Therefore, if the rights of petitioners were increased beyond those created by the contract on which the minds of the parties met, the additional rights were created by a statute, the Fair Labor Standards Act. The only relation of these additional rights to contracts is that they were superimposed by a statute on contracts which all the parties, when they made the contracts and when the contracts were performed, believed in good faith were not affected by the statute. They were, therefore, statutory rights.[6]

Furthermore, they were not purely private rights, but rights created to effectuate a public purpose, namely, the regulation of interstate commerce. *U. S.* v. *Darby,* 312 U. S. 100 (1940); *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, 704-5, 709-11 (1945).

That such rights, unless they had been reduced to final judgment, must necessarily fall when the Fair Labor Standards Act was modified by the Portal-to-Portal Act has been too well settled to require further review by this Court.

From the earliest days of the common law it has been an established doctrine in our jurisprudence that rights cre-

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[6] Actions brought and rights asserted under the Fair Labor Standards Act were described as "statutory actions" and "statutory rights" by this Court in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 574; (1942); *Tennessee Coal, Iron & Railroad Co., et al.* v. *Muscoda Local No. 123, et al.,* 321 U. S. 590, 602-3 (1944); *Jewell Ridge Corp.* v. *United Mine Workers,* 325 U. S. 161, 167 (1945).

ated by a statute fall with the repeal of that statute. *Miller's case*, 1 William Blackstone, 450, 3 Burrow's, 1456 (1764); *Kay* v. *Goodwin* 6 Bingham 576, 4 Moore & P. 341 (1830). As stated by this Court in *Flanigan* v. *Sierra County*, 196 U. S. 553, at page 560 (1905):

> "The general rule is that powers derived wholly from a statute are extinguished by its repeal."

In *Ewell* v. *Daggs*, 108 U. S. 143 (1883), this Court, in holding that a defense created under a usury statute was extinguished with its repeal, said, at page 151:

> "* * * the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and * * * whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction may, by a subsequent statute, be taken away."

This doctrine has been upheld in many other cases.[7]

Petitioners have cited only one case apparently departing from this general rule, but it rests on a well-defined exception, namely, that if the government itself, municipal or Federal, has, by its own deliberate act, assumed an obligation under an existing statute (not merely a gratuity, but an obligation for which some consideration has been exacted from the other party to the transaction), this Court will not permit the repudiation of that obligation when the statute is repealed. The single

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[7] These include *U. S.* v. *Schooner Peggy*, 1 Cranch. 103 (1801); *Maryland* v. *Baltimore & Ohio R. R. Co.*, 3 How. 534 (1845); *Norris* v. *Crocker*, 13 How. 429 (1851); *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285 (1883); *Campbell* v. *Holt*, 115 U. S. 620 (1885); *Morley* v. *Lake Shore and M. So. Ry. Co.*, 146 U. S. 162 (1892); *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646 (1896); *West Side R. R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 92 (1911); *Western Union Telegraph Co.* v. *Louisville and Nashville Railroad Co.*, 258 U. S. 13 (1922); *Dodge* v. *Board of Education*, 302 U. S. 74 (1937); *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304 (1945). See also *National Car Loading Corp.* v. *Phoenix-El Paso Express, Inc.*, 142 Texas 141, 176 S. W. 2d 564, 569, 570 (1943), cert. den. 322 U. S. 747.

case cited is *Ettor* v. *Tacoma*, 228 U. S. 148 (1913), arising under a State statute, in which this Court held that the City of Tacoma could not repudiate its obligation to pay an abutting owner damages caused by street grading after the statute authorizing the grading and imposing the obligation had been repealed. Petitioners might also have cited *Lynch* v. *U. S.*, 292 U. S. 571 (1934) which also illustrates this exception[8] but involved a Federal statute, the Economy Act of 1933. This Court there characterized the statutory abrogation of the contractual obligations of the United States under War Risk Insurance policies as "an act of repudiation" (P. 580) and held that "the due process clause prohibits the United States from annulling" such obligations (P. 579). Since the Act involved was a Federal Act, the Court added an important qualification to its holding (which is significant in relation to the principle discussed in point (b), *infra*, page 10), namely, "unless, indeed, the action taken falls within the federal police power or some other paramount power." The Court added (pp. 579-580):

> "The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate contracts in the exercise of the police or any other power."

Petitioners' claims in the present case contain no factor which even remotely brings them within this exception, for not only do they involve no repudiation by any governmental authority of its own obligation, but these claims are not even based on change of position or reliance on previous law, which might also be said to enter into the decisions resting on this exception to the general rule. Petitioners' claims are for payments for which they did not contract and which they did not expect to receive. They are merely claims based on a statute passed to effectuate a public policy, and specifically withdrawn when Congress found the public interest to require such withdrawal.

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[8] See also *Perry* v. *U. S.*, 294 U. S. 330, 350-1 (1935).

(b) The Portal-to-Portal Act was a valid exercise by Congress of its power over interstate commerce; and rights, whether acquired by private contract or under a statute, are subject to change or removal by Congress in the exercise of that power.

Under the principle referred to in (a) above, rights created by statute for a public purpose, and which have not previously been reduced to final judgment, fall when the statute creating them is repealed or modified, save under exceptional and well-defined circumstances. But there is a second sustaining principle, the one on which the Circuit Court of Appeals mainly rested its decision in the *Battaglia* case and in the instant case, namely, that the Portal-to-Portal Act was a valid exercise by Congress of its power to regulate interstate commerce. Under this principle, it is fundamental that when Congress exercises what was referred to in the *Lynch* case as one of its "paramount" powers, it is not fettered under the due process clause of the Fifth Amendment by the existence of private rights, whether the rights be vested rights in private property, rights growing out of express contracts between private persons or rights created by statute for a public purpose. Such rights may be changed or removed by Congress in the exercise of its Constitutional power. This principle has been firmly established by a long line of decisions of this Court in many fields, including those relating to interstate commerce, currency, bankruptcy and national defense. The principle is similar to that often sustained by this Court that private rights are not protected by the due process clause of the Fourteenth Amendment from action taken by a State in the exercise of the police power. This principle is so fundamental that it should scarcely be necessary to discuss it; but since what petitioners are now doing is to attempt, without mention of this principle, to persuade this Court that the contrary should be established, we are obliged to deal with it.

Although petitioners have avoided mention of this principle, their position necessarily is that their claims, created by the Fair Labor Standards Act, were immune from Con-

gress' power to regulate interstate commerce when Congress found it necessary to exercise this power in the Portal-to-Portal Act. Petitioners argue, in effect, that, having by legislation created rights on which the present claims were brought into existence, Congress placed those claims beyond its control and could not later recall them. If this argument were sound, it would mean that if Congress has legislated in an endeavor to regulate and protect commerce and the legislation so enacted gives rise to certain rights which later experience shows place unexpected burdens and obstructions on commerce, Congress is powerless to remove such burdens and obstructions. In an extreme case, it would even mean that if the obstructions created by its first act were so serious as to bring commerce to a complete standstill, Congress would be unable to rectify the situation and to exercise the very power which the Constitution has expressly conferred on it. Even without going to this extreme, the statement of petitioners' argument carries its own refutation, and it is not surprising that petitioners have not supported it with a single authority.

As just stated, the correct rule of law is precisely the reverse of the proposition petitioners urge.

In *North American Co.* v. *S. E. C.*, 327 U. S. 686 (1946), the Court said, at pages 705-6:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. * * * It is unrestricted by contrary state laws or private contracts. * * * 'The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.' *In re Rahrer*, 140 U. S. 545, 562."

In *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1 (1937), this Court said at pages 36 and 37:

> "The fundamental principle is that the power to regulate commerce is the power to enact 'all appro-

> priate legislation' for 'its protection and advancement'; * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' "

As stated by the Court below in the *Battaglia* case:

> "If the contractual arrangements of these private parties were subject to the Fair Labor Standards Act as it might be interpreted by the courts, or were modified to take into consideration decisions construing that statute, they were also subject to changes made in it by Congress in the exercise of its power to regulate commerce. * * * The controlling principle was said in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 435, to be that: 'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.' "

There are many other cases in which this Court has sustained this principle.[9]

It may be granted that Congress cannot act arbitrarily in exercising one of its constitutional powers but must adopt appropriate means having a substantial relation to

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[9] *U. S.* v. *Darby*, 312 U. S. 100 (1940); *American Power & Light Co.* v. *S.E.C.*, 329 U. S. 90 (1946); *Louisville and Nashville Railroad Company* v. *Mottley*, 219 U. S. 467 (1911); *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240 (1935); *Fleming* v. *Rhodes*, 331 U. S. 100 (1947); *Union Bridge Co.* v. *United States*, 204 U. S. 364 (1907); *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert*, 224 U. S. 603 (1912); *United States* v. *Carolene Products*, 304 U. S. 144 (1938); *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (1899); *Continental Illinois Bank & Trust Co.* v. *Chicago R. I. & Pac. Ry. Co.*, 294 U. S. 648 (1935); *Legal Tender Cases*, 12 Wall. 457 (1870). Cases involving the police power of States include *Union Dry Goods Co.* v. *Georgia Public Services Corp.*, 248 U. S. 372 (1919); *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548 (1914); *Chicago, B. & Q. Ry. Co.* v. *Drainage Com'rs*, 200 U. S. 561 (1906).

the object sought to be attained. The Congressional findings and determination of policy set forth in the first Section of the Portal-to-Portal Act, unchallenged by even a scintilla of evidence in this case or by any argument advanced in the present petition, are clearly sufficient to meet these tests. *U. S.* v. *Darby, supra,* at page 115: *North American Co.* v. *S.E.C., supra,* at page 708; *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934).

(c) The contracts between petitioners and respondent, if illegal in not providing for the payments claimed by petitioners, were validated by the retroactive curative provisions of the Portal-to-Portal Act.

The District Court expressly found that at the time the employment contracts were made and performed neither plaintiffs nor defendant believed that additional payments were required under the Fair Labor Standards Act. The parties had not agreed to those payments nor changed their position in any way because of that Act.

By the passage of the Portal-to-Portal Act, Congress removed the added benefit and burden superimposed on those contracts by the Fair Labor Standards Act, validated the terms of the original contracts as they had been, in good faith, agreed upon, and restored the parties to their original positions as they had planned and understood them when their contracts were made and when they were fully carried out and consummated.[10] This Court has repeatedly upheld such curative legislation.

In an early case, Mr. Justice Story said of a statute validating an invalid conveyance of land, in *Watson* v. *Mercer,* 8 Pet. 88 (1834):

> "It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected." (Page 111)

[10] At the time the entire transaction was completed, it was still three and one-half years before this Court decided, for the first time, that respondent's business, in some of its aspects, is interstate commerce. *U. S.* v. *South-Easten Underwriters Ass'n,* 322 U. S. 533 (1944).

In *Ewell* v. *Daggs, supra,* the Court said of a statute removing the defense of usury created by a statute in force when the promissory note in suit was made:

> "The right which the curative or the repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley, Constitutional Limitations, 378[11] and cases cited." (Page 151).

This principle also is supported by abundant and unconflicting authority.[12]

The decision of the Circuit Court of Appeals is, therefore clearly correct on this additional principle.

3. Petitioners' contention that the Portal-to-Portal Act violates the constitutional prohibition against delegation of legislative power, a contention which petitioners make for the first time in their petition to this Court, is based on a palpable misconstruction of the Act.

Petitioners assert in their petition to this Court that Congress in the Portal-to-Portal Act violated the constitutional prohibition against the delegation of legislative power "in conferring upon undesignated and unlimited Federal agencies power not only to relieve employers of the consequence of their own violations of a prior Act of Congress, but to do so by giving retroactive effect to the casual and informal representations of the innumerable officials, employees and representatives of such agencies, without notice, without hearing, and without adequate guidance."

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[11] II. Cooley, Constitutional Limitations, 8th Ed., 784.

[12] *McNair* v. *Knott*, 302 U. S. 369 (1937); *Graham & Foster* v. *Goodcell*, 282 U. S. 409 (1931); *West Side R. R. Co.* v. *Pittsburgh Construction Co., supra; National Car Loading Corporation* v. *Phoenix-El Paso Express, Inc., supra; Williams* v. *Paine*, 169 U. S. 55 (1897); *Utter* v. *Franklin*, 172 U. S. 416 (1899), *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505 (1902).

This is the first time such an argument has been made in this case, and under the rule of this Court as stated in *Young* v. *Masci*, 289 U. S. 253 (1933), it does not furnish a ground for review. Then, this Court, having found that the lower court correctly held that a statute was not inconsistent with the due process clause or the equality clause of the Fourteenth Amendment, stated, at page 261, "As it does not appear that any claim under the contract clause was made below, we need not consider the answers to this contention". (See also *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328 (1933)). That case involved an appeal from a State court, but the same rule has been followed when this Court was reviewing decisions of lower Federal courts. *Robinson & Co.* v. *Belt*, 187 U. S. 41 (1902); *Hines Trustees* v. *Martin*, 268 U. S. 458 (1925); *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 410 (1932).

Furthermore, this argument shows a total misconstruction of the Portal-to-Portal Act. Congress in that Act did not confer any legislative power on Federal agencies but granted relief from what it had found to be unexpected and burdensome liabilities created by the Fair Labor Standards Act. Consistently with the purposes and policy of the Portal-to-Portal Act, it granted the relief only to employers who had acted or omitted action *in good faith*, and as tests for determining whether their action or omission was *in good faith*, it set up (in Section 9) the criterion of whether an employer had acted or omitted to act "in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged" and (in Section 11) the criterion of whether "he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended." This has nothing to do with a delegation of legislative power but simply establishes an objective and highly pertinent standard of the good faith which may be availed of under

the Act. See *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264, 272 (E. D. Tenn. 1947). Cf. *Gonzales* v. *U. S.*, 162 F. 2d. 870 (C. C. A. 9, 1947).

CONCLUSION

The decision of the court below is clearly correct and no questions are presented which warrant consideration by this Court. Petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

Excerpts from Portal-to-Portal Act of 1947

Sec. 1. Congressional findings and declaration of policy —(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts. May 14, 1947, c. 52, § 1, 61 Stat. 84.

Sec. 9. Reliance on Past Administrative Rulings, Etc.— In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of

employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Sec. 11. Liquidated Damages.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

Excerpt from Fair Labor Standards Act of 1938

Sec. 2. Congressional finding and declaration of policy —(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, § 2, 52 Stat. 1060.

Appendix B

Circuit Court Decisions Dealing with the Portal-to-Portal Act

The Second Circuit in the instant case, 169 F. 2d 262, expressly upheld the constitutionality of Sections 9 and 11 of the Act, and in the companion case of *Battaglia, et al* v. *General Motors*,[13] 169 F. 2d 254, expressly upheld Section 2 of the Statute as constitutional.

The Fourth Circuit in *Seese* v. *Bethlehem Steel*, 168 F. 2d 58 and in the case of *Attalah, et al* v. *B. H. Hubbert & Son*,[13] F. 2d ; 15 CCH Labor Cases 64631, expressly upheld the constitutionality of Section 2 of the Act.

In the Fifth Circuit, in the case of *Reed* v. *Murphey*,[13] 168 F. 2d. 257, the constitutionality of the statute was impliedly recognized at p. 262.

In the Sixth Circuit, the constitutionality of the Act was expressly upheld in *Rogers Cartgage* v. *Reynolds*, 166 F. 2d 317 (Sections 9 and 11) and in *Fisch* v. *General Motors Corp.* and *Bateman* v. *Ford Motor Co.*, 169 F. 2d 266 (Sec. 2); and in the case of *DeWaters* v. *The Macklin Company*,[13] 167 F. 2d 694 (Section 9), the constitutionality of the Statute was impliedly recognized at pp. 699-700.

In the Eighth Circuit, in *Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759, the constitutionality of the statute was impliedly recognized at pp. 763-766 (Sections 9 and 11).

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[13] Petition for Writ of Certiorari pending in this Court.

Appendix C

Reported Decisions Expressly or Impliedly Upholding the Constitutionality of Sections 2, 6, 9 and/or 11 of the Portal-to-Portal Act

District of Columbia

1. *Blessing* v. *Hawaiian Dredging Co.*, Dist. of Col., February 6, 1948, 76 F. Supp. 556 (Sec. 9).

1st Circuit

1. *Moeller* v. *Eastern Gas & Fuel Associates*, D. Mass., December 22, 1947, 74 F. Supp. 937 (Sec. 2).
2. *Marchant* v. *Sands Taylor and Wood Co.*, D. Mass., January 29, 1948, 75 F. Supp. 783 (Secs. 9-11).

2nd Circuit

1. *Local 626, UAW-CIO* v. *General Motors Corporation*, D. Conn., October 22, 1947, 76 F. Supp. 593 (Sec. 2).
2. *William Cardinale, et al.* v. *General Motors Corporation*, NDNY, October 25, 1947, 76 F. Supp. 743 (Sec. 2).
3. *Edmund B. Borucki, et al.* v. *Continental Baking Company*, SDNY, November 7, 1947, 74 F. Supp. 815 (Sec. 2).
4. *Frank Holland, et al.* v. *General Motors Corporation*, WDNY, December 15, 1947, 75 F. Supp. 274 (Sec. 2).
5. *Sochulak* v. *American Brake Shoe Company*, SDNY, January 5, 1948, 79 F. Supp. 437 (Sec. 2).
6. *Sinclair* v. *U. S. Gypsum Company*, WDNY, January 27, 1948, 75 F. Supp. 439 (Sec. 2).
7. *Lesser* v. *Sertners, Inc.*, SDNY, June 10, 1947, 76 F. Supp. 144 (Secs. 9-11).
8. *Kerew* v. *Emerson Radio*, SDNY, June 16, 1947, 76 F. Supp. 197 (Secs. 9-11).
9. *Bartels et al.* v. *Piel Bros.*, EDNY, September 8, 1947, 74 F. Supp. 41 (Sec. 6).

10. *Drabkin et al.* v. *Gibbs & Hill,* SDNY, October 13, 1947, 74 F. Supp. 758 (Sec. 6).
11. *Divins et al.* v. *Hazeltine Electronics,* SDNY, December 18, 1947, 79 F. Supp. 513 (Sec. 9).
12. *Camiano et al.* v. *Rifkin,* SDNY, March 11, 1948, 77 F. Supp. 363 (Sec. 9).
13. *Ispass et al.* v. *Pyramid Motor,* SDNY, April 13, 1948, 78 F. Supp. 475 (Sec. 11).
14. *Wells et al.* v. *Radio Corp. Am.,* SDNY, May 20, 1948, 77 F. Supp. 964 (Sec. 9).
15. *Asselta et al.* v. *149 Madison Ave. Corp.,* SDNY, July 1, 1948, 79 F. Supp. 413 (9-11).
16. *Iocono et al.* v. *Anastasio et al.,* SDNY, August 18, 1948, 79 F. Supp. 378 (Sec. 6).
17. *Bartels* v. *Sperti,* SDNY, Sept. 2, 1947, 73 F. Supp. 751 (Secs. 2 and 6).
18. *Battaglia et al.* v. *General Motors Corp.,* W. D. N. Y. Dec. 15, 1948, 74 Fed. Supp. 274; Aff. July 8, 1948, 169 F. 2d 254 (Sec. 2).
19. *Moeller et al.* v. *Atlas Powder Company,* D. Conn. Oct. 22, 1947 76 F. Supp. 707 (Sec. 2).

3rd Circuit

1. *Hart* v. *Aluminum Company of America (forty-three cases),* WD Pa., October 8, 1947, 73 F. Supp. 727 (Sec. 2).
2. *Battery Workers' Union Local 113 etc.* v. *Electric Storage Battery Co.,* Jan. 30, 1948, 78 F. Supp. 947—ED Pa. (Sec. 2).
3. *Shippard et al.* v. *Am. Dredging Co.,* ED Pa., April 14, 1948, 77 F. Supp. 73 (Sec. 9).
4. *Grazeski* v. *Fed. Shipb'dg.,* DNJ, April 16, 1948, 76 F. Supp. 845 (Sec. 2).
5. *Medrick et al.* v. *Textile Mach. Works,* ED Pa., July 16, 1948, 79 F. Supp. 567 (Sec. 2).
6. *Industrial Union of Marine & Shipbuilding Workers of Am. C. I. O. Local #1* v. *N. Y. Shipbuilding Corp.,* DNJ, August 9, 1948, 79 F. Supp. 104 (Sec. 2).
7. *Hoyt et al.* v. *Merritt-Chapman,* DNJ, August 9, 1948, 79 F. Supp. 106 (Sec. 2).

4th Circuit

1. *Seese, et al.* v. *Bethlehem Steel Company,* D. Md., October 14, 1947, 74 F. Supp. 412; affirmed 168 F. 2d 58; May 5, 1948 (Sec. 2).

5th Circuit

1. *Burfiend* v. *Eagle-Picher Company,* ND Tex., May 21, 1947, 71 F. Supp. 929 (Sec. 2).
2. *Story, et al.* v. *Todd Houston Shipbuilding Corporation,* SD Tex., July 14, 1947, 72 F. Supp. 690 (Sec. 2).
3. *May, et al.* v. *General Motors Corporation,* ND Ga., October 17, 1947, 73 F. Supp. 878 (Sec. 2).

6th Circuit

1. *Lasater, et al.* v. *Hercules Powder Company,* ED Tenn., July 25, 1947, 73 F. Supp. 264 (Sec. 2).
2. *Colvard, et al.* v. *Southern Wood Preserving Company,* ED Tenn., November 1, 1947, 74 Supp. 804 (Sec. 2).
3. *Bateman* v. *Ford Motor Co.* and *Fisch et al.* v. *General Motors Corp.,* ED Mich., Feb. 27, 1948, 76 F. Supp. 178 (Sec. 2), aff. 169 F. 2d 266.
4. *Vigen et al.* v. *Great Lakes Dredging,* ND Ohio, October 1, 1947, 79 F. Supp. 410 (Sec. 9-11).
5. *Boerkoel* v. *Hayes Mfg. Corp.,* WD Mich., March 26, 1948, 76 F. Supp 771 (Sec. 2).
6. *Fletcher et al.* v. *Grinnell Bros.,* ED Mich., June 2, 1948, 78 F. Supp. 339 (Sec. 11).
7. *Fajack* v. *Cleveland Graphite Company,* N. D. Ohio, July 23, 1947, 73 F. Supp. 308.

7th Circuit

1. *Ackerman, et al.* v. *J. I. Case Company,* ED Wis., November 4, 1947, 74 F. Supp. 639 (Sec. 2).
2. *Smith, et al.* v. *American Can Co.,* ED Ill., January 12, 1948, 8 F. R. D. 112 (Sec. 2).
3. *Green, et al.* v. *Stokely Foods, Inc.,* ED Ill., January 12, 1948, 8 F. R. D. 112 (Sec. 2).
4. *Tormey* v. *Kiekhaefer Corp.,* ED Wis., March 8, 1948, 76 F. Supp. 557 (Sec. 11) (Sec. 2).
5. *Hughes* v. *Werner's Estate et al.,* SD Ill., June 30, 1948, 78 F. Supp. 762 (Sec. 6).

8th Circuit

1. *Sadler* v. *Dickey Clay Manufacturing Company,* WD Mo., September 30, 1947, 73 F. Supp. 690 (Sec. 2).
2. *Johnson, et al.* v. *Park City Consolidated Mines Company,* ED Mo., October 3, 1947, 73 F. Supp. 852 (Sec. 2).
3. *Charles Breusing, et al.* v. *General Motors Corporation* (Fisher Body Div., Kansas City Plant), WD Mo., October 29, 1947, 74 F. Supp. 541 (Sec. 2).
4. *Bumpus* v. *Remington Arms Company,* WD Mo., C. A., December 10, 1947, 74 F. Supp. 788 (Sec. 2).
5. *Smith, et al. v. Cudahy Packing Company,* D. Minn., December 12, 1947, *Parenteau, et al.* v. *Swift & Company,* D. Minn., C. A., December 12, 1947 and *Schempf, et al.* v. *Armour & Company,* D. Minn., C. A., December 12, 1947, 76 F. Supp. 575 (Sec. 2).
6. *Plummer* v. *Minneapolis-Moline Power Implement Company,* D. Minn., February 3, 1948, 76 F. Supp. 745 (Sec. 2).
7. *Lockwood* v. *Hercules Powder Company,* WD Mo., February 16, 1948, 78 F. Supp. 716 (Sec. 2).
8. *Jackson* v. *Northwest Airlines,* D. Minn., Feb. 9, 1948, 76 F. Supp. 121 (Sec. 9-11).
9. *Gustafson* v. *Wolferman,* WD Mo., July 17, 1947, 73 F. Supp. 186 (Sec. 9-11).
10. *Breusing et al.* v. *Fisher,* WD Mo., October 29, 1947, 74 F. Supp. 541 (Sec. 2).
11. *Conwell* v. *Central Missouri Telephone Co.,* DC Mo., March 10, 1948, 76 F. Supp. 398 (Sec. 9-11).
12. *Sadler et al.* v. *W. S. Dickey Clay,* WD Mo., February 26, 1948, 78 F. Supp. 616 (Sec. 2).
13. *Tucker* v. *Pratt Whitney,* WD Mo., March 25, 1948, 77 F. Supp. 227 (Sec. 2).
14. *Reid* v. *Day & Zimmerman,* SD Iowa, Sept. 25, 1947, 73 Fed. Supp. 892 (Secs. 9-11).

9th Circuit

1. *Cochran, et al.* v. *St. Paul and Tacama Lumber Company (four cases),* WD Wash., May 26, 1947, 73 F. Supp. 288 (Sec. 2).
2. *Boehle* v. *Electric Metallurgical Company,* D. Ore., June 9, 1947, 72 F. Supp. 21 (Sec. 2).
3. *Ditto* v. *Aluminum Company of America,* SD Cal., June 9, 1947, 73 F. Supp. 955 (Sec. 2).
4. *Quinn, et al.* v. *California Shipbuilding Corporation,* SD Cal., C. A., September 29, 1947, 76 F. Supp. 742 (Sec. 2).
5. *Alameda, et al.* v. *Paraffine Companies, Inc.,* ND Cal., November 24, 1947, 75 F. Supp. 282 (Sec. 2).
6. *Hollingsworth, et al.* v. *Federal Mining and Smelting Company (twenty-eight cases),* DC Idaho, December 12, 1947, 74 F. Supp. 1009 (Sec. 2).
7. *Kirkham* v. *Pacific Gas & Electric Company,* ND Cal., December 19, 1947, 78 F. Supp. 658 (Sec. 2).
8. *Role* v. *Neils Lumber Company,* D. Mont., December 19, 1947, 74 F. Supp. 812 (Sec. 2).
9. *Kam Koon Wan* v. *E. E. Black Limited,* DC Hawaii, February 5, 1948, 75 F. Supp. 553 (Sec. 9).
10. *Devine et al.* v. *Joshua Hendy Corp.,* ~~SD~~ Calif., April 30, 1948, 77 F. Supp. 893 (Secs. 2-11).